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No. 91-1116

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

KENNETH HICKS,
Petitioner,

vs.

BROWN GROUP, INC., d/b/a
BROWN SHOE COMPANY, INC.,
Respondent.

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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RULE 29.1 LIST

Brown Group, Inc., d/b/a Brown Shoe Company, Inc., has no parent. Brown Group, Inc. holds no controlling interest in any companies which are not wholly-owned subsidiaries.

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STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 14.1(g), Petitioner is required to provide "[a] statement of the case containing the facts material to the consideration of the questions presented." (emphasis omitted). Inasmuch as Petitioner failed to provide this Court with a statement including *all* material and procedural facts, Respondent herein is compelled to provide a brief statement of the case.

In 1982, Kenneth Hicks was terminated from his employment by Brown Group, Inc., d/b/a Brown Shoe Company, Inc., Respondent herein. Hicks brought suit under the Civil Rights Act

of 1866, codified at 42 U.S.C. § 1981, alleging that his termination was improperly motivated by his race, white. In 1988, judgment was entered against Respondent based upon the jury's verdict. While the jury awarded Hicks zero in actual damages, it nonetheless awarded Hicks Ten Thousand Dollars ($10,000.00) in punitive damages. In response, the court modified the jury verdict by increasing the verdict through a grant of additur, awarding one dollar ($1.00) in nominal damages.

On appeal, a panel of the Eighth Circuit Court of Appeals affirmed, *Hicks v. Brown Group, Inc.*, 902 F.2d 630 (8th Cir. 1990), despite this Court's earlier decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), which clearly held that discriminatory discharges, *inter alia*, are not actionable under § 1981. In response, Respondent herein properly and timely filed a Petition for Rehearing *En Banc*, which was denied. Accordingly, Respondent herein properly and timely filed its Petition for a Writ of Certiorari with this Court.

In the interim, a different panel of the Eighth Circuit Court of Appeals criticized *Hicks*, but, albeit reluctantly, followed precedent. *Taggart v. Jefferson County Child Support Enforcement Unit*, 915 F.2d 396 (8th Cir. 1990). Thereafter, the Eighth Circuit then granted rehearing *en banc* in *Taggart*. In light of the Circuit's impending *en banc* decision in *Taggart*, this Court vacated the judgment in *Hicks* and remanded the cause on writ of certiorari. *See Brown Group, Inc. v. Hicks*, 111 S. Ct. 1299 (1991).

In June of 1991, the Eighth Circuit issued its *en banc* decision in *Taggart*, holding that discriminatory discharge claims are not actionable under section 1981. 935 F.2d 947, 948 (8th Cir. 1991). Thereafter, a panel of the Eighth Circuit issued an order on October 9, 1991 reversing the judgment in favor of Hicks and remanding the cause to the district court with directions to dismiss the Complaint with prejudice. Hicks neither filed a

petition for rehearing nor petitioned the court for an extension of time in which to do so. On October 22, 1991, Hicks filed a motion to stay the mandate pending an application for certiorari with this Court, and Respondent herein filed its brief in opposition. By order of court dated October 28, 1991 United States Magistrate David D. Noce dismissed the cause with prejudice. At that point, the cause had been adjudicated under the laws that existed prior to the enactment of the Civil Rights Act of 1991. Despite the October 28, 1991 dismissal of the cause, the Eighth Circuit granted Hicks' motion to stay the mandate until December 30, 1991. The court further stated that if a petition for writ of certiorari was filed on or before December 30, the stay would continue.

In response, Hicks filed a motion to vacate Judge Noce's order dismissing the cause, which was subsequently granted on November 12, 1991. Hicks had yet to file his petition for writ of certiorari. Nine days later, on November 21, 1991, the Civil Rights Act of 1991 was enacted, which provided, in part, that discriminatory discharges were actionable under section 1981. Thereafter, Hicks filed a motion to vacate the Eighth Circuit's October 9, 1991 order, which reversed and remanded with directions to dismiss Hicks' cause, as well as a motion to extend the stay of the mandate for eight days, so he might petition this Court for a writ of certiorari. Both motions were denied. On December 30, 1991, the stay of the mandate expired. On January 7, 1992, Hicks filed this Petition for Writ of Certiorari in this Court.

SUMMARY OF ARGUMENT

Petitioner herein is urging this Court to grant his Petition for Writ of Certiorari to the Eighth Circuit Court of Appeals to decide the issue of whether the Civil Rights Act of 1991 is retrospective in nature and thus, applicable to the instant case. Alternatively, Petitioner requests this Court to grant the petition, vacate the Eighth Circuit's prior judgment and remand the cause to the court of appeals with directions to address the same issue.

In response, Respondent herein respectfully submits that this Court, in its discretion, deny the instant petition. A review of the unique procedural posture of this case, as well as all relevant facts and circumstances, indicate clearly that this cause is not the proper vehicle upon which to grant certiorari to resolve the issue of whether the Civil Rights Act of 1991 applies retrospectively.

First, the alleged conflict alluded to by Petitioner is not the type of conflict upon which certiorari is customarily based and thus, in accordance with Supreme Court Rule 10, review by this Court is unwarranted. The conflict upon which Petitioner bases his petition arises among the *district* courts. Inasmuch as this alleged conflict may in fact be resolved subsequently at the appellate level, this 'conflict' is not ripe. It is the duty and function of the appellate courts to resolve such conflicts, and thus, this 'conflict' is properly resolved at the appellate level. In accordance with that view, the type of conflict generally sufficient to warrant review by this Court arises at the appellate level, not at the district court level. In addition, the 'conflict' upon which Petitioner bases his petition arises wholly outside the realm of this particular case, thereby rendering this case an inappropriate candidate for a grant of certiorari herein. Accordingly, in accordance with Supreme Court Rule 10, the instant petition should be denied.

Second, due to the unique factual and procedural posture of this case, any resolution herein will not fully resolve the issue in general and thus, this case is not the proper vehicle upon which to base a grant of certiorari. As set out in more detail below, this case has, in effect, been fully adjudicated as of October 9, 1991 under the laws that existed prior to the effective date of the Civil Rights Act of 1991. In addition, the procedural posture of this case evidences a gross abuse by Petitioner of the judicial system and the federal rules, which afforded Petitioner the present opportunity to seek certiorari herein. Such abuse should not be condoned herein by a grant of certiorari.

Third, this case is an improper vehicle for review inasmuch as the issue of the retrospectivity of the Civil Rights Act of 1991 was not properly or timely presented to the Eighth Circuit Court of Appeals. The issue of the possible application of the Civil Rights Act of 1991 to this case was initially raised in Petitioner's motion to vacate filed on December 23, 1991. This motion, in essence, was a petition for rehearing which was neither timely filed nor in the proper form. Accordingly, since this issue is not properly before this Court, certiorari should be denied.

Moreover, Respondent submits that the instant petition be denied outright inasmuch as the Civil Rights Act of 1991 is clearly prospective in nature, thereby rendering any grant of certiorari unnecessary. Recent decisions of this Court have fashioned a strong presumption against retrospectivity, which is overcome only when Congress expressly declares otherwise. There exist no such explicit declarations in the 1991 Act, and thus, the 1991 Act is clearly prospective in application. Furthermore, legislative intent is clear that the 1991 Act is to be applied only prospectively. Accordingly, this Court should deny this petition in its entirety.

REASONS FOR DENYING THE WRIT

I. This Cause Is Not The Proper Vehicle Upon Which To Grant Certiorari To Resolve The Issue Of Whether The Civil Rights Act Of 1991 Applies Retrospectively To Pending Cases.

Petitioner herein is urging this Court to grant a writ of certiorari in efforts to breathe a second life into this particular cause. Petitioner is seeking to have this Court either decide the issue of retrospectivity of the Civil Rights Act of 1991 or, alternatively, to order the cause remanded for further consideration in light of the Civil Rights Act of 1991. Simply put, Petitioner is seeking to apply the 1991 Act to this cause of action which arose nearly ten years ago and was, in effect, fully adjudicated *before* the passage of the 1991 Act.

Petitioner relies heavily upon the existence of an apparent conflict which has surfaced among district courts in urging this Court to grant the petition. To the contrary, the existence of a direct conflict on a seemingly important issue is *not* dispositive; this Court has, in its discretion, denied certiorari notwithstanding such clear conflict. *See, e.g., Baxter v. Morizavires*, 455 U.S. 1006 (1982); *Greco v. Orange Memorial Hospital Corp.*, 423 U.S. 1000 (1975). A review of the unique procedural posture of this case and consideration of all relevant facts and circumstances demonstrates convincingly that this particular cause is not the proper vehicle for the resolution of whether the 1991 Act is to be applied retrospectively or prospectively.

A. The Alleged Conflict Is Not The Type Of Conflict Upon Which Certiorari Is Based And Thus, In Accordance With Supreme Court Rule 10, Review By This Court Is Unwarranted.

When the Eighth Circuit Court of Appeals rendered its order on October 9, 1991 ordering the dismissal of this cause with

prejudice, the order was wholly in accord with this Court's holding in *Patterson*, barring section 1981 suits based upon discriminatory discharges. Moreover, the Eighth Circuit's order was in accord with various circuit courts as well. *See, e.g., Gonzalez v. Home Insurance Co.*, 909 F.2d 715, 722 (2d Cir. 1990); *McKnight v. General Motors Corp.*, 908 F.2d 104, 108-09 (7th Cir. 1990), *Courtney v. Canyon Television & Appliance Rental*, 899 F.2d 845, 849 (9th Cir. 1990); *Lavender v. V & B Transmission & Auto Repair*, 897 F.2d 805, 807-08 (5th Cir. 1990). Clearly, since the decision of the Eighth Circuit rendered herein did not conflict with other courts of appeals, a state court of last resort, or did not otherwise so far depart from the accepted course of judicial proceedings, a grant of certiorari would be improvident herein. *See* S. Ct. R. 10.1(a).

Yet, Petitioner Hicks cites to several *district* court opinions as evidence of an alleged conflict sufficient to warrant a grant of certiorari in this case. Notwithstanding the existence of such alleged conflict among these certain *district* courts, this Court should deny this petition. As explained above, no Rule 10 conflict arose due to the adjudication of *this particular case*. The conflict to which Petitioner Hicks alleges is thus *outside* the realm of this particular case, thereby rendering this case an improper vehicle for review. Simply put, Petitioner Hicks is attempting to 'bootstrap' the conflict so as to make this case *appear* to be a proper vehicle for review. To the contrary, while the district court cases cited by Petitioner Hicks may well be proper candidates for ultimate review on certiorari, this case most certainly is not.

More importantly, this alleged 'conflict' is not yet ripe, inasmuch as further litigation may produce a consensus at the appellate level, or at least, a satisfactory majority. Accordingly, inasmuch as this issue may well be rendered moot by subsequent courts of appeals' rulings, this petition is, in essence, a request for an advisory opinion, which therefore must be denied out-

right. Again, the type of conflict sufficient to warrant review by this Court must arise at the *appellate* level, *not* at the *district court* level. As stated by Justice Harlan:

> Generally speaking, nothing short of a difference of decision between two Courts of Appeals, or between a Court of Appeals and the Court of Claims, whose judgments are reviewable directly by the Supreme Court, will suffice to satisfy the 'conflict' rule. *A conflict of decision between two district courts is not a ground for certiorari, since resolution of such a conflict is a matter resting with the Courts of Appeals.*

Harlan, J., *Manning the Dikes*, 13 RECORD OF N.Y.C. BAR ASS'N 541, 552 (1958) (emphasis added).

Thus, the conflict alleged herein is clearly not one which merits review by this Court. Not only is Petitioner Hicks attempting to bootstrap the conflict to proffer an *appearance* of a meritorious basis for review, he is also attempting to deny the courts of appeals the opportunity to perform that which they were created to do—produce a consensus among their respective district courts. As exemplified throughout the existence of our judicial system, conflicts among district courts are properly resolved by the respective courts of appeals, and not by this Court. Accordingly, inasmuch as this conflict is not yet ripe for review, nor within the scope of Supreme Court Rule 10, this Court, in its exercise of discretion, should deny certiorari herein.

B. A Resolution Of This Issue As It Relates To This Factually Unique Case May Not Fully Resolve The Issue In General And Thus, Lacks Sufficient General Importance To Merit Review By This Court.

Although the issue of the retrospectivity of the Civil Rights Act of 1991 might well be significant in future cases that may be presented properly before this Court, the unusual posture of this

particular case renders it an inappropriate candidate for consideration of this issue. For all practical purposes, this case has been fully and finally adjudicated. This matter, arising nearly ten years ago, has been fully tried before a jury, appealed and affirmed, denied rehearing *en banc*, vacated and remanded by this Court, reversed by the Eighth Circuit on October 9, 1991 with orders to dismiss and, in accordance with such orders, a mandate had, in fact, issued dismissing this case with prejudice — all *prior* to the passage of the Civil Rights Act of 1991. Yet, while Petitioner Hicks wholly failed to file a proper and timely motion for rehearing *en banc* in response to the October 9, 1991 order, just *prior* to the issuance of the mandate he filed a motion to stay the mandate for the express and sole purpose of "application to the Supreme Court for a Writ of Certiorari." This motion, granted *after* the mandate had already issued, provided for a stay up to and including December 30, 1991, which was to continue *provided* Petitioner Hicks filed his petition *within that period.* Yet, Petitioner Hicks filed his petition on January 7, one week *after* the expiration of the stay of the mandate.

While *technically* this case may be deemed "pending" inasmuch as the order issuing the mandate was vacated, for all practical effects and purposes this matter has been fully and finally adjudicated prior to the passage of the Civil Rights Act of 1991. Specifically, the October 9, 1991 order represented the full adjudication of the parties' rights; the ministerial act of the issuance of the mandate itself, which was immediately forthcoming inasmuch as the stay of the mandate had expired, was all that remained. Petitioner Hicks was apparently cognizant of this fact, as represented by his unsuccessful attempt to extend the stay of the mandate, which was set to expire on December 30, 1991. Inasmuch as this case is *not* representative of the type of cases which would, in fact, be otherwise appropriate vehicles for review, a resolution of the issue in this case will not resolve the alleged conflict and thus, certiorari should be denied.

Further indicia of the 'finality' of this cause as of October 9, 1991 is Petitioner Hicks' failure to file timely a petition for rehearing with suggestions for rehearing *en banc* in response to the Eighth Circuit's October 9 adjudication. As evidenced by his failure to so file, there existed no "points of law or fact which in the opinion of the petitioner the Court ha[d] overlooked or misapprehended." Fed. R. App. P. 40(a). Thus, it is clear that Petitioner Hicks' motivation behind his motion to stay the mandate was not, in fact, to petition for certiorari as he so represented — there existed no proper grounds upon which such petition could be based. To the contrary, Petitioner Hicks' motivation behind the motion to stay the mandate was solely to delay the issuance of the mandate in anticipation of the passage of the Civil Rights Act of 1991. Thus, in the event of such passage, Petitioner Hicks could rely upon the Act to revive his cause of action. In fact, Petitioner Hicks concedes as much in his Statement of the Case. He states: "At [the time of the expiration of the period in which to petition for rehearing], the Civil Rights Act of 1991 was not law. . . . Accordingly, plaintiff Hicks was in no position to file a timely petition for rehearing . . . ." Petition for Writ of Certiorari, at 6.

Moreover, this is not the first instance in this case whereupon Petitioner Hicks had awaited in anticipation the passage of intervening legislation. When this cause was previously before this Court on a petition for writ of certiorari, Petitioner herein urged this Court to exercise judicial restraint in interpreting section 1981 based in significant part upon the *speculation* that Congress was soon to pass the Civil Rights Act of 1990. Thus, it is clear that at the time Petitioner Hicks filed his motion to stay the mandate, it was not filed with the intention to file a petition for certiorari, but was filed to bide time for Congress to pass the legislation which would provide his *only* basis for further review. It is only as a result of this abuse of the judicial process that allows Petitioner Hicks, on the basis of a procedural technicality

arising solely from this flagrant abuse, to argue for the ultimate revival of his cause. Such abuse cannot be condoned herein by the grant of certiorari.

As demonstrated by the foregoing, this is not the proper vehicle for this Petition for Writ of Certiorari on this issue. Not only has this case, in effect, been finally adjudicated, but the procedural posture evidences a gross abuse of the judicial system and the federal rules. Such abuse and indifference to notions of judicial economy, to which Petitioner Hicks now conveniently alludes, should not be rewarded. In summary, the resolution of the issue as it relates to the peculiar posture of this case effectively precludes a finding of broad, general importance to merit review by this Court. Accordingly, this Court, in its discretion, should deny this Petition for Writ of Certiorari.

C. This Court Should Deny Certiorari On The Issue Of the Retrospectivity Of The Civil Rights Act Of 1991 Inasmuch As Such Issue Is Not Properly Before This Court.

The issue of the retrospectivity of the Civil Rights Act of 1991 is not properly before this Court inasmuch as it was not properly or timely raised before the Eighth Circuit Court of Appeals. The issue of the possible retrospectivity of the Civil Rights Act of 1991 initially was raised in Petitioner Hicks' motion to vacate filed on December 23, 1991. Such motion is one not contemplated by either the Federal Rules of Appellate Procedure or the local rules of the Eighth Circuit. In essence, the motion was a petition for rehearing which was neither timely nor in the proper form. *See* Fed. R. App. P. 40. Accordingly, this issue was not properly presented to the Court of Appeals and thus, should not now be decided by this Court. *See EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986); *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 412 n.7 (1982).

In response, Petitioner Hicks argues that he was unable to file properly a motion for rehearing because the Civil Rights Act of 1991 had not yet been enacted before the expiration of the filing period. Petitioner Hicks' contention, however, further evidences the inappropriateness of this case for review. As of the expiration date of the period in which to file such petition, Petitioner Hicks had *no proper grounds* upon which to base a petition for rehearing. Hence, it is apparent the rights of the parties had been *fully* and *fairly* adjudicated. Again, only through abuse of process is Petitioner Hicks able to attempt to revive this claim, and, in effect, to have this case, which spanned over ten years, retried in its entirety.

In addition, it is important to note that the fourteen-day limitation contained in Rule 40, Federal Rules of Appellate Procedure, is designed, in part, to promote judicial economy/efficiency, ensure prompt redress, and respect finality of judgments. While Rule 40 permits an enlargement of time by court order, Petitioner Hicks failed to seek such enlargement, despite the immense publicity surrounding the "impending" Civil Rights Act of 1991. Therefore, even assuming *arguendo* that Petitioner Hicks should not be denied certiorari due to his failure to file a properly or timely petition for rehearing, it is certainly relevant that Petitioner Hicks, despite the incumbence upon him to do so in light of the publicity surrounding the imminency of the passage of the Civil Rights Act of 1991, wholly failed to seek an enlargement of time in which to file his petition pursuant to Rule 40. Petitioner Hicks failed to adhere to either the rules or their time limitations. Thus, to allow Petitioner Hicks to now, after the fact, be heard on this issue would render the underlying principles behind Rule 40 meaningless.

In summary, Petitioner Hicks failed to file timely or properly a petition for rehearing in response to the Eighth Circuit's October 9, 1991 order, and, in addition, failed to seek an extension of time in which to do so. Additionally, Petitioner

Hicks' motion to vacate the October 9 order, in which this issue initially was raised, was in essence an improperly and untimely filed petition for rehearing. Accordingly, since this issue was not properly presented to the Eighth Circuit Court of Appeals, it would be improvident to grant certiorari herein.

II. The Petition For Certiorari Should Be Denied Outright Inasmuch As The Civil Rights Act Of 1991 Is Clearly Prospective In Nature.

The Civil Rights Act of 1991 (Pub. L. No. 102-166) was approved by Congress on November 7, 1991, and signed into law by President Bush on November 21, 1991. Section 102(b) of the Act provides for the recovery of compensatory and punitive damages; Section 102(c) establishes a right to jury trial. On the general question of retroactivity, the starting point is Section 402. Section 402 establishes the effective date for the above provisions:

> **Sec. 402. EFFECTIVE DATE.**
>
> (a) In General. Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.
>
> (b) Certain Disparate Impact Cases. Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.

The "starting point for interpretation of a statute 'is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.' " *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 110 S. Ct. 1570, 1575 (1990) (quoting *Consumer*

Product Safety Comm'n v. G.T.E. Sylvania, Inc., 447 U.S. 102, 108 (1980)).

Section 402(a) states that "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." The Act is *silent* as to its retrospective application. Accordingly, the inquiry can end here. It is a "familiar canon of statutory construction," *Consumer Product Safety Commission v. G.T.E .Sylvania Corp.*, 447 U.S. 102, 180 (1980), that the plain language of a statute must control its meaning in the absence of "clear evidence" of a "clearly expressed" congressional intent to the contrary. *Bread Political Action Committee v. Federal Election Commission*, 455 U.S. 577, 580 (1982). Yet, Petitioner Hicks is urging courts to read 402(a) as if it contained a qualifying clause: "[e]xcept as otherwise specifically provided *in actions specifying that its provisions are prospective*, this Act and the amendments made by this Act shall take effective upon enactment *and shall apply to all cases pending upon or filed after that date.*" Such urging clearly is improper.

Even assuming that section 402's language is not completely dispositive, the legislative history of the Act establishes, beyond a doubt, that the Act is not to be applied retrospectively.

A. The Civil Rights Act Of 1991 Act Is Not To Be Applied Retrospectively.

The Civil Rights Act of 1991 arose in the Senate as S. 1745 and is backed by a wealth of legislative history clearly demonstrating that it was never intended to apply retrospectively. A fair review of the legislative history compels the conclusion that the Act does not apply retrospectively.

1. Sponsors' Interpretative Memorandum.

On October 30, 1991, Senator Danforth, the chief sponsor of the compromise which led to the Act, submitted the Sponsors' Interpretative Memorandum regarding S. 1745. The Interpretative Memorandum was "intended to reflect the intent of all of the original co-sponsors to S. 1745" and was signed by Senator Danforth and six others. Prior to printing the Memorandum, Senator Danforth cited with approval two recent Supreme Court decisions:

> Our intention in drafting the effective date provision was to adhere to the principle followed by the vast majority of Supreme Court cases and exemplified by *Bowen* and Justice Scalia's concurrence in *Bonjorno*.

137 Cong. Rec. S 15483 (daily ed. Oct. 30, 1991).

In explaining what was then denominated as Section 22 (now Section 402), this Interpretative Memorandum provided as follows regarding retrospectivity:

> The Bill provides that, unless otherwise specified, the provisions of this legislation shall take effect upon enactment and *shall not apply retroactively*.

Id. at S 15485 (emphasis added).

No Senator expressed any direct challenge to this relevant section of the Interpretive Memorandum. In fact, Senator Kennedy, in his response to the introduction of the Interpretive Memorandum, did *not* state that the 1991 Act was to be applied retrospectively. At most, Senator Kennedy merely abdicated the responsibility to the judiciary, without stating his intent. *Id.* While clearly expressing his divergent views on *other* issues raised in the Interpretive Memorandum, he took no clear position on the issue of retrospectivity, despite the clear and unambiguous views expressed in the Interpretive Memorandum.

Accordingly, the view of prospectivity espoused by Senator Danforth is of substantial importance. Indeed, "remarks . . . of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1987). Further, the statements of Senator Danforth are "to be accorded substantial weight," *Federal Energy Adm'n v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976), inasmuch as "it is to the sponsors that we look when the meaning of the statutory words is in doubt." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1981). Clearly, as submitted by Senator Danforth, the Interpretive Memorandum rejects retrospective application of the Civil Rights Act of 1991.

2. Section by Section Analysis.

Shortly before Senator Danforth submitted the Interpretative Memorandum, Senator Dole introduced into the record a Section by Section Analysis representing the views of President Bush, together with fourteen additional Senators. The language contained within this analysis regarding Section 402 is one hundred percent (100%) in accord with that of the Interpretive Memorandum. The analysis submitted by Senator Dole of the effective date provision states as follows:

> Section 22 specifies that the Act and the Amendments made by the Act take effect upon enactment. *Accordingly, they will not apply to cases arising before the effective date of the Act.* [citing *Bowen* and *Bonjorno*]. At the request of the Senators from Alaska, section 22(b) specifically points out that nothing in the Act will apply retroactively to the Wards Cove Packing Company, an Alaska company that spent 24 years defending against a disparate impact challenge.

137 Cong. Rec. S 15478 (daily ed. Oct. 30, 1991) (emphasis added).

Moreover, President Bush, on signing this Act, stressed that the administration would treat this analysis "as authoritative interpretive guidance by all officials in the executive branch with respect to the . . . matters covered in the documents." Statement on Signing the Civil Rights Act of 1991, 27 *Weekly Compilation of Presidential Documents* 1701, 1702 (Nov. 21, 1991). Such presidential statements are indeed relevant in a court's interpretation of a statute. *See, e.g., United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 31-32 (1982) (according "great weight" to executive views); *NLRB v. Local 103, Int'l Ass'n of Bridge Workers*, 434 U.S. 335, 347 n.9 (1978) (presidential transmittal letter).

3. Supreme Court Authority.

Both the Interpretive Memorandum and the Section By Section Analysis make it quite clear that the Act is to be interpreted from a prospective standpoint in accord with *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 109 S. Ct. 468 (1988), and the concurring opinion of Justice Scalia in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 110 S. Ct. 1570 (1990). *Bowen* clearly held that a new statute should be applied only prospectively unless there exists *specific indication to the contrary*. 109 S. Ct. at 471. In so holding, this Court stated, "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Id.* (citing *Greene v. United States*, 376 U.S. 149, 160 (1964); *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 164 (1944); *Miller v. United States*, 294 U.S. 435, 439 (1935); *United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 162-63 (1928)).

Thus, the merit of any argument in support of retrospectivity is wholly dependent upon the current viability of the "principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."

Bradley v. School Bd. of the City of Richmond, 416 U.S. 696, 711 (1974). At a minimum, the continuing viability of *Bradley* is subject to question inasmuch as it pre-dates this Court's most recent holdings on this issue. Further, in light of Justice Scalia's insightful concurrence in *Bonjorno*, it is more probable than not that *Bradley* is simply no longer 'good law.' Simply put, recent decisions of this Court have fashioned a strong presumption against retrospectivity, overcome only when Congress *expressly* declares otherwise. Since there is no *express l*anguage mandating retrospectivity, the Civil Rights Act of 1991 clearly is prospective in nature.

B. The Civil Rights Act Of 1990 And H.R. 1 1991 Provide Further Indicia That The Civil Rights Act Of 1991 Be Applied Prospectively Only.

Had Congress intended the Act to apply to pending cases, Congress is quite capable of saying so. Twice in recent months Congress proposed amendments to Title VII/Section 1981 which plainly applied retrospectively. The defeat of these amendments, coupled with the legislative history of the Act, amplify the conclusion that the Act does *not* apply retrospectively.

1. Civil Rights Act of 1990.

Markedly different than the Civil Rights Act of 1991, the 1990 Act contained very specific language clearly evidencing Congress' intent that the law apply retrospectively. Section 15 of S. 2104 provided that certain provisions would apply "to all proceedings pending on or commenced after" the date of the particular Supreme Court decision being overturned. Moreover, the section provided for the vacating of orders and the reopening of cases where orders were inconsistent the new legislation. President Bush summarily rejected this legislation. Following the Presidential veto of the Civil Rights Act of 1990, Congress chose *not* to incorporate retrospective language into the 1991

Act. The absence of such language constitutes additional evidence of congressional intent: by consciously failing to inject retrospective language into the Act, it is clear that Congress did not intend the Civil Rights Act of 1991 to be applied retrospectively.

2. H.R. 1 1991.

Even more persuasive is Congress' *deletion* of specific retrospective language in H.R. 1, an earlier House version of the 1991 Act. Section 112 of H.R. 1 contained specific language which provided that the legislation would apply to all proceedings "pending on or commenced after" the date of the decision being overturned by the legislation. Section 112 was ultimately deleted from the bill and replaced with the present Section 402. Where Congress includes certain language in an earlier version of legislation, but deletes it prior to enactment, it is presumed that the former language was not intended. *Russell v. United States*, 464 U.S. 16 (1983). The deletion of Section 112 from H.R. 1 is clear and convincing evidence of Congress' *rejection* of *any* retrospective application of the Civil Rights Act of 1991.

C. The Specific Wards Cove Exemption Of Section 402(b) Does Not Support An Inference Of General Retrospectivity.

Section 402(b) (*Wards Cove* exemption) of the Act does *not* effect the general prospectivity of the Act. Congress has clearly expressed its view that the Act not be applied retrospectively, and has guarded against any implication to the contrary arising from this specific exemption. In fact, legislative history clearly demonstrates that this section was inserted only to correct a technical error. *See* 137 Cong. Rec. S 15963 (daily ed. Nov. 5, 1991). Senator Dole, with the agreement of Senators Murkowski and Stevens, introduced the following clear history into the record:

> *Absolutely no inference is intended or should be drawn from the language of [the Wards Cove exemption]* that the provisions of the Act or the amendments it makes may otherwise apply retroactively to conduct occurring before the date of enactment of this Act. Such *retroactive application of the Act and its amendments is not intended*; on the contrary, the intention of [the *Wards Cove* exemption] is simply to honor a commitment to eliminate every shadow of a doubt as to any possibility of retroactive application to the case involving the Wards Cove Company.

137 Cong. Rec. S 15953 (daily ed. Nov. 5, 1981) ("Legislative History, Technical Corrections") (emphasis added).

Other Senators expressing the same view included Senator Durenberger, *id.* at 15966 ("Some may attempt to argue at a later date that a special exemption creates an inference that the bill, in general, is retroactive. [T]hat is the wrong conclusion to draw from this [exemption]."); and Senator Simpson. *Id.* ("By [exempting Wards Cove], I am in no way implying that all other companies with litigation pending on the date of enactment should be treated retroactively.").

D. The Extraterritoriality Provision Of Section 109(c) Does Not Support An Inference Of General Retrospectivity.

Section 109(c) does not negate the general prospectivity of the Act as expressed in section 402(a). In fact, this Court similarly has rejected such proposition in *United States v. Menasche*, 348 U.S. 528 (1955). In *Menasche*, this Court entertained the issue of whether there was a conflict between two sections of the Immigration and Nationality Act of 1952 (INA), 66 Stat. 280. Specifically, section 405(a) of the INA provided, with language similar to that contained in section 402 of the Civil Rights Act of 1991, that "nothing contained in this Act, unless otherwise

specifically provided therein, shall be construed . . . ." Another section of the INA, section 405(b), provided that "except as otherwise specifically provided in Title III . . . ." This Court, in rejecting the argument that section 405(b) negated the general prospectivity of section 405(a), emphasized that section 405(b) "merely implement[ed] and emphasiz[ed] the operation of its forerunner and "the slight negative implication derived . . . is overcome by the broad sweep of § 405(a) and its direction that prior law applies unless the Act 'otherwise specifically provid[ed].' " *Menasche*, 348 U.S. at 527-28 (emphasis omitted). Similarly, the slight negative implication arising from section 109(c) of the Civil Rights Act of 1991 in no way negates the general prospectivity of the Act as provided by section 402(a).

E. The EEOC Policy Guidance On Retrospectivity Of The Civil Rights Act Of 1991 Comports With The View That The Amendments Not Be Applied Retrospectively.

In terms of the damages provisions in the Civil Rights Act of 1991, the United States Equal Employment Opportunity Commission has concluded it will not seek damages in charges filed prior to the enactment of the Act, or in post-Act charges that challenge pre-Act conduct. The Commission has reasoned that because *Bowen* represents this Court's more recent holding on the issue of retrospectivity, the Commission will follow the dictates of that case with regard to the retrospectivity of the damages provision. Moreover, the Commission has recognized that a strong argument can be made that, even under *Bradley*, "manifest injustice" would occur if the damage provisions were applied to pre-Act conduct and cases pending upon enactment. *See* EEOC Policy Guidance on Retroactivity of Civil Rights Act of 1991, *reprinted in* 1 Daily Labor Report D-1 (Jan. 2, 1992), at n.15 (citing *Bess v. Bess*, 929 F.2d 1332, 1335-36 (8th Cir. 1991)

(retroactive application of damages provision in Electronic Communications Privacy Act of 1986 would result in manifest injustice" since it "could alter the rights of individuals and the expectation of private litigants")); *see also High v. Broadway Industries, Inc.*, No. 90-1066-CV-W-3 (D. Mo. Jan. 7, 1992).

CONCLUSION

For all the foregoing reasons, Respondent herein respectfully submits that the Petition for a Writ of Certiorari be denied in its entirety.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 85-1392 C (2)

KENNETH G. HICKS,
Plaintiff,

v.

BROWN GROUP, INC., etc.,
Defendant.

ORDER

In accordance with the Order of the United States Court of Appeals for the Eighth Circuit, filed on October 9, 1991,

IT IS HEREBY ORDERED that the complaint filed in this action, now on remand, is dismissed with prejudice.

/s/ David D. Noce
UNITED STATES MAGISTRATE
JUDGE

Signed this 28th day of October, 1991.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2769/2817EMSL

Kenneth G. Hicks,
Appellee,

vs.

Brown Group, Inc., d/b/a
Brown Shoe Company, Inc.,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

Appellee's motion for stay of mandate has been considered by the court and is granted.

The issuance of mandate in this case shall be stayed to and including December 30, 1991. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court that a petition for writ of certiorari has been filed, this stay shall continue until final disposition of the case by that court.

October 31, 1991

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U. S. Court of Appeals, Eighth Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 85-1392 C (2)

KENNETH G. HICKS,
Plaintiff,

v.

BROWN GROUP, INC., etc.,
Defendant.

ORDER

Consistent with the Order of the United States Court of Appeals for the Eighth Circuit, filed on October 31, 1991,

IT IS HEREBY ORDERED that the motion of plaintiff to vacate the Order issued by this Court on October 28, 1991, is sustained.

/s/ David D. Noce
UNITED STATES MAGISTRATE
JUDGE

Signed this 12th day of November, 1991.